Re Badan Pengurusan Bersama Kondominium Lagenda

HIGH COURT (KUALA LUMPUR) — COMPANY WINDING UP NO 28–14 OF 1998
VAZEER ALAM J
27 OCTOBER 2017

Companies and Corporations — Winding up — Winding up order — Stay of order — Setting aside stay of winding up order — Whether applicant entitled to set aside stay of winding up order — Whether application to stay ought to serve on applicant — Whether all creditors paid off — Whether applicant contributory with locus standi to make application for stay of winding up — Whether there was inordinate delay in making application of setting aside of stay of winding up — Companies Act 1965 s 218

Jeuro, a company incorporated on 5 July 1990 was involved in the business of property development. Condominium Lagenda ('the condo') was developed and completed by Jeuro. On 2 February 1998, Jeuro was ordered to be wound up upon a petition filed by Chai Fook Eau and Kuan Kim Yew, both trading as Pembinaan Sri Aktif, a creditor of Jeuro. The applicant, a statutory body, was established pursuant to s 7(2) of the Building and Common Property (Maintenance and Management) Act 2007. On 30 August 2000, Eng Song Huat ('ESH') as contributory of Jeuro, applied vide enclosure 80 for an order that the winding up order dated 2 February 1998 be stayed pursuant to s 243(1) of the Companies Act 1965 ('the CA') and/or O 92 r 4 of the Rules of Court 2012. The court granted the stay order on 9 November 2012 wherein the winding up order was stayed and the liquidator was discharged. As the consequence of the stay order, Jeuro was once again to carry on its business activities pursuant to s 243 of the CA. The applicant stated that it had been informed by the department of insolvency Malaysia that the winding up order of Jeuro had been stayed by the stay order. The applicant stated that before the notification by the department of insolvency, it had no prior knowledge of any application to stay the winding up order. A few months thereafter, the applicant filed encl 85 to set aside the stay of winding up order. The issues for court's consideration were: (a) whether the applicant was legally entitled to file the present application; (b) whether the application for stay ought to have been served on the applicant; (c) whether all creditors of Jeuro had been paid; (d) whether ESH was a contributory with locus standi to make the application for the stay of winding up in encl 80; and (e) whether there was inordinate delay in making the present application.

Held, dismissing the applicant's application with cost of RM5,000:

(1) The applicant was not entitled to participate in liquidation process, specifically in terms of receiving dividends as creditors, as proof of debt was never filed. The applicant was not entitled to file the present application ostensibly on the ground that it was a prospective creditor (see para 19).

(2) As the applicant lacked locus standi to make the present application as it was not within any of the classes of creditors recognised by official receiver, it was found that there was no necessity for the applicant to have been served with notice of application in encl 80 and its supporting cause papers (see para 21).

(3) Official receiver had admitted that all the amounts stated in the proof of debt had been paid in full prior to the stay of winding up was applied for (see para 23).

(4) Once an absolute discharge was given, the property of the discharged, except for those caught under ss 35(1)(a) and 35A of the Bankruptcy Act 1967, divested from Director General of Insolvency and the discharged bankrupt was free to deal with the properties. The Director General of Insolvency had no reason to hold on the estate of the discharged bankrupt, especially when all debts had been settled. There was no merit in the arguments of learned counsel for the applicant that a discharged bankrupt lacked locus standi when making the application for the stay of winding up order (see para 33).

(5) Pursuant to the findings and decisions of three separate tribunals ie the Malacca Sessions Court, the Malacca High Court and the Court of Appeal, the applicant had wrongfully and unlawfully received monies that belonged to Jeuro. The present application had been filed for the collateral purpose of attacking that final judgment and was not made bona fide. If indeed the applicant was genuinely interested in claiming the maintenance charges owed by Jeuro, then it ought to have taken action a long time ago when the Director General of Insolvency rejected its claim for the alleged arrears in maintenance charges. There was no necessity for the applicant to seek to impugn the stay order after a lapse of more than four years (see paras 36–37).

[Bahasa Malaysia summary

Jeuro, sebuah syarikat yang beroperasi pada 5 Julai 1990 telah terlibat dalam perniagaan pembangunan hartanah. Kondominium Lagenda ('kondo tersebut') telah dibangunkan dan disempurnakan oleh Jeuro. Pada 2 Februari 1998, Jeuro telah diperintahkan untuk digulungkan berdasarkan satu petisyen yang difailkan oleh Chai Fook Fau dan dan Kuan Kim Yew, kedua-keduanya terlibat dalam perdagangan Pembinaan Sri Aktif, pemiutang bagi Jeuro. Pemohon, satu badan statutori, telah ditubuhkan di bawah Akta. Pada 20 Ogos 2000, Eng Soon Huat ('ESH') sebagai penyumbang Jeuro telah memohon

melalui lampiran 80 penggantungan perintah penggulungan bertarikh 2 Februari 1998 di bawah peruntukan s 243(1) Akta Syarikat 1965 ('Akta Syarikat') dan A 92 k 4 Kaedah-Kaedah Mahkamah 2012. Mahkamah telah membenarkan penggantungan perintah penggulungan pada 9 November 2012 dan peliduikasi telah dilepaskan. Akibat daripada perintah penggantungan tersebut, Jeuro telah menjalankan perniagaan seperti biasa di bawah peruntukan s 243 Akta Syarikat. Pemohon menyatakan telah dimaklumkan oleh Jabatan Insolvensi Malaysia bahawa perintah penggulungan telah digantung melalui satu perintah penggantungan. Pemohon menyatakan sebelum dimaklumkan mengenai perintah penggantungan tersebut, pemohon tidak mengetahui terdapat apa-apa pemohonan penggantungan perintah dilakukan. Beberapa bulan kemudian, pemohon memohon melalui lampiran 85 agar perintah penggantungan diketepikan. Isu-isu berbangkit adalah: (a) sama ada pemohon berhak membuat permohonan seperti dalam kes semasa ini; (b) sama ada permohonan untuk penggantungan perintah perlu disampaikan kepada responden; (c) sama ada kesemua pemiutang Jeuro telah dibayar; (d) sama ada ESH sebagai penyumbang mempunyai locus standi untuk membuat permohonan melalui lampiran 80; dan (e) sama ada terdapat kelewatan masa oleh pemohon dalam membuat permohonan semasa.

Diputuskan, menolak permohonan pemohon dengan kos RM5,000;

(1) Pemohon tidak berhak untuk terlibat dalam proses likuidasi, terutamanya dalam terma menerima dividen sebagai pemiutang, disebabkan bukti keberhutangan tidak pernah difailkan. Pemohon tidak berhak untuk failkan permohonan semasa disebabkan pemohon adalah bakal pemiutang untuk masa hadapan (lihat perenggan 19).

(2) Disebabkan pemohon tidak mempunyai locus standi untuk membuat permohonan semasa atas alasan pemohon tidak termasuk dalam kalangan pemiutang yang disahkan oleh penerima rasmi, adalah didapati tidak menjadi keperluan untuk pemohon diberi penyampaian melalui notis permohonan dalam lampiran 80 berserta dengan kertas sebab sokongan (lihat perenggan 21).

(3) Penerima rasmi telah mengakui bahawa kesemua jumlah yang dinyatakan dalam bukti keberhutangan telah dibayar secara penuh sebelum permohonan penggantungan penggulungan (lihat perenggan 23).

(4) Setelah perintah perlepasan mutlak diberikan, harta yang dilepaskan, kecuali yang termaktub dalam ss 35(1)(a) dan 35A Akta Kebankrapan 1967, diserahkan oleh Ketua Pengarah Insolvensi dan individu yang dilepaskan dari kebankrapan bebas untuk berurusan dengan harta. Ketua Pengarah Insolvensi tidak mempunyai alasan untuk memegang harta individu yang dilepaskan bankrap, terutamanya apabila kesemua hutang

telahpun dibayar. Tiada merit dalam hujahan peguam terpelajar pemohon yang mengatakan individu yang dilepaskan bankrap tiada locus standi untuk memohon penggantungan perintah penggulungan (lihat perenggan 33).

(5) Berdasarkan dapatan dan keputusan tiga tribunal yang berasingan iaitu Mahkamah Sesyen Melaka, Mahkamah Tinggi Melaka dan Mahkamah Rayuan, pemohon dengan salah dan tidak mematuhi undang-undang dalam menerima wang kepunyaan Jeuro. Permohonan semasa difailkan adalah bertujuan untuk menafikan penghakiman akhir yang dibuat dan ianya tidak mempunyai unsur niat jahat. Sekiranya pemohon berminat untuk menuntut caj penyelengaraan yang tertunggak daripada Jeuro, pemohon boleh mengambil tindakan pada satu ketika dahulu ketika Ketua Pengarah Insolvensi menolak tuntutan tunggakan caj penyelengggaraan tersebut. Adalah tidak menjadi keperluan untuk pemohon untuk memgenepikan perintah penggantungan melebihi tempoh lebih empat tahun (lihat perenggan 36–37).]

Notes

For cases on stay of order, see 3(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2067–2085.

Cases referred to

Chew Kean Kor v Beh Seng Siew [1958] 1 MLJ 149 (refd)

Ga-Seng Paper Marketing Sdn Bhd v Percetakan Warni Sdn Bhd [2015] 9 CLJ 640, HC (refd)

Intermain Properties Ltd, Re [1986] BCLC 265, Ch D (refd)

Jarrett v Barclay's Bank, Limited and Nash [1947] Ch 54, Ch D (refd)

Leadbitter, In re (1878) 10 Ch D 388, CA (refd)

Lai Cheng Ooi (the executrix of the estate of Lee Tain Tshung @ Kee Thien Chiung, deceased) v Naslei Enterprise Sdn Bhd (receivers appointed) [2015] MLJU 704; [2015] 10 CLJ 409, HC (refd)

Low Kok Tuan, ex p Arab-Malaysian Merchant Bank Bhd, Re [1996] MLJU 442; [1997] 4 CLJ 185, HC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)

Pravinchandra Doshi (T/A M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor [1999] 1 MLJ 35, HC (refd)

SM Ali Kader & Co, Re; Re Chop Hock Joo Seng; Re Chop Tye Chiang Heng; Re Chop Kwong Woh Loong [1937] 1 MLJ 84 (refd)

Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, applicant) [1995] 2 MLJ 700; [1995] 3 CLJ 136, HC (refd)

Wolverhampton Steel & Iron Co Ltd and others, Re [1977] 3 All ER 467, CA (not folld)

Wolverhampton Steel & Iron Co Ltd and others, Re [1977] 1 All ER 417, Ch D (not folld) A

Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors [1995] 2 MLJ 709, FC (refd)

Legislation referred to B

Bankruptcy Act 1914 [UK] s 92(5)
Bankruptcy Act 1967 (now Insolvency Act 1967) ss 8(1), 18(16), 24(4), 35, 35(1)(a), (2), 35A, 82, 122(7)
Building and Common Property (Maintenance and Management) Act 2007 (repealed by Strata Management Act 2013) ss 7(2), 8 C
Companies (Winding-Up) Rules 1972 r 78, Form 94
Companies Act 1948 [UK] ss 216(a), 256(1)
Companies Act 1965 ss 216(2), 227, 232(1), 243, 243(1)
Rules of Court 2012 O 92 r 4
Strata Management Act 2013 s 21 D

Michael KT Chow (Michael Chow) for the appellant.
Nizam Bashir (Nizam Bashir & Assoc) for the respondent.

Vazeer Alam J: E

[1] Enclosure 85 is the applicant's application:

(a) to set aside the order of this court dated 9 November 2012 wherein the earlier winding up order of Jeuro Developments Sdn Bhd ('Jeuro') was stayed ('stay order'); and F

(b) for a consequential order that pursuant to ss 232(1) and/or 227 of the Companies Act 1965, such other person or persons that the applicant may nominate be appointed as liquidator of Jeuro.

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[2] I dismissed encl 85 with cost of RM5,000 for the following reasons.

BACKGROUND FACTS

[3] Jeuro, a company incorporated on 5 July 1990, was involved in the business of property development. Kondominium Lagenda ('the condo') was developed and completed by Jeuro with the certificate of fitness for occupation being issued on or about 26 May 1995. H

[4] On 2 December 1998, Jeuro was ordered to be wound up by this court upon a petition filed by Chai Fook Eau and Kuan Kim Yew, both trading as Pembinaan Sri Aktif, a creditor of Jeuro. The petition was supported by Teo Teck Huat (M) Sdn Bhd and Malayan Banking Bhd. The assistant official receiver, Malacca, was appointed as the Provisional Liquidator of Jeuro. I

A **[5]** The Statement of Affairs of Jeuro affirmed on 15 July 2000 by one Eng Song Huat ('ESH'), a contributory of Jeuro, shows that seven parcels units at the condo were owned by Jeuro.

B **[6]** On 25 May 2010, the applicant, a statutory body, was established pursuant to s 7(2) of the Building and Common Property (Maintenance and Management) Act 2007. The duty of the applicant, among others, is to properly maintain the common property at the condo and keep it in a state of good and serviceable repair. The applicant is conferred with power under the law to collect from parcel owners of the condo maintenance and management C charges. The duties and powers of the applicant were previously governed by s 8 of the Building and Common Property (Maintenance and Management) Act 2007, and are now set out in s 21 of the Strata Management Act 2013, following the repeal of the Building and Common Property (Maintenance and D Management) Act 2007.

[7] On 30 August 2012, ESH as contributory of Jeuro, applied vide encl 80 for an order that the winding up order dated 2 December 1998 be stayed pursuant to s 243(1) of the Companies Act 1965 and/or O 92 r 4 of the Rules E of Court 2012. This court having heard ESH's counsel, as weil as the liquidator, granted the stay order on 9 November 2012 wherein the winding up order dated 2 December 1998 was stayed and the liquidator was discharged. As a consequence of the stay order, Jeuro was once again allowed to carry oh its business activities pursuant to s 243 of the Companies Act 1965.

F **[8]** The applicant states that on 22 November 2012 it was informed by the Department of Insolvency, Malaysia, that the winding up order of Jeuro dated 2 December 1998 had been stayed by the stay order dated 9 November 2012. The applicant states that before that notification by the Department of G Insolvency, Malaysia, it had no prior knowledge of any application to stay the winding up order, nor the grounds for a stay of the winding up order dated 2 December 1998.

[9] Sometime in June 2016, Jeuro commenced an action against the H applicant in the Malacca High Court Suit No 22NCVC-26–06 of 2016. Subsequent thereto, the applicant states that its new solicitors, Messrs Michael Chow, conducted a court file search on the winding up proceedings of Jeuro and learnt for the first time that the application for stay of the winding up order was made on 30 August 2012 and that among the grounds for the stay I application was the desire of Jeuro (as developer) to apply for strata titles to the parcel units in the condo.

[10] A few months thereafter, the applicant filed encl 85 to set aside the stay of winding up order, inter alia, on grounds:

(a) that the applicant was not served with the notice of application dated 30 August 2012 (encl 80) together with the affidavit in support affirmed by ESH dated 27 August 2012, as a result of which the views of the applicant as creditor were not heard by the court before granting the stay order;

(b) that the grounds in support of the application for the stay order are unsustainable;

(c) that misrepresentations have been made to the court to secure the stay order;

(d) that there is no proof that all creditors of Jeuro have been paid; and

(e) that there is non-compliance of the Winding-Up Rules and Regulations.

[11] The applicant asserts that when the application for the stay order was made on 30 August 2012 it was a creditor of Jeuro, and therefore argues that it ought to have been served with the notice of application dated 30 August 2012. The applicant further contends that it is creditor of Jeuro for the following reasons:

(a) on 5 December 2011, the applicant had written to the Department of Insolvency, Malaysia, to request for payment of the outstanding maintenance charges for parcel units in the condo owned by Jeuro; and

(b) on or about 10 July 2012, the applicant received a letter of even date from the Department of Insolvency, Malaysia, informing that the official receiver will pay the outstanding maintenance fee to the applicant for the parcel units owned by Jeuro, oniy for the period after the date of formation of the applicant on 25 May 2012 arid not as claimed by the applicant.

THE LAW — POWER TO STAY WINDING UP

[12] Section 243(1) of the Companies Act 1965 provides as follows:

> (1) At any time after an oftler for winding up has been made the Court may, on the application of the liquidator or of any creditor or contributory and on proof to the satisfaction of the Court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings either altogether or for a limited time on such terms and conditions as the Court thinks fit.

ESH had made the application in encl 80 for the stay order pursuant to s 243(1) of the Companies Act 1965. The Federal Court in *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709 had laid down the following principles in granting an application to stay a winding up order under s 243(1) of the Companies Act 1965, and they are:

(1) The granting of a stay under s 243 of the Act is discretionary and the onus is on the party seeking a stay to make out a positive or sufficient case.

(2) The attitude of the creditors, cpntributpries and the liquidator is a relevant consideration.

(3) That in exercising its discretion, the court will consider not only the interest of the creditors, but alsp whether it is conducive or detrimental to commercial morality and to the interests of the public at large.

(4) Last, and which by no means least, is that a stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

The Federal Court in that case had stated that these principles are non-exhaustive.

[13] Further, the High Court in *Ting Yuk Kiong v Mawar Biru Sdn Bhd (Harry Lee Yew Tong, applicant)* [1995] 2 MLJ 700; [1995] 3 CLJ 136, in respect of its exercise of discretion under s 243(1) of the Companies Act 1965 had stated as follows:

> Under the law therefore the granting of a stay of further proceedings of the winding up is a discretionary matter for the court and the onus is on the applicant to make out a positive case for a stay. In exercising' its discretion the (court has to consider certain factors and would act on certain principles which have been established by decided cases, in *Re Warbler Pty Ltd* [1982] 6 ACLR 526 the following principles are enumerated:
>
> (a) The granting of a stay is a discretionary matter and there is a clear onus on the applicant to make out a positive case for a stay: *Re Calgary and Edmonton Land Co Ltd* [1975].
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> (b) There must be service of notice of the application for a stay on all creditors and contributories and proof of this (*Re South Barruie State Quarry Co* [1969] LR 8 Eq 688, *Re Bank of Queensland Ltd* [1870] 2 QS CR 113 referred to).
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> (c) The nature and extent of the creditors must be shown and whether or not all debts have been discharged. *Krextile Holdings Pty Ltd v Widdows* [1974] VR 689 at 694; *Re Dalia Homes Pty Ltd* [1972] 2 NSWLR 22 at 26 referred to).
>
> (d) The attitude of creditors, contributories and the liquidator is a relevant consideration. (*Re Calgary and Edmonton Land Co Ltd* referred to).
>
> (e) The current trading position and general solvency of the company should be demonstrated. Solvency is of significance when a stay of proceedings in the winding up is sought. (*Re a Private company* [1935] NZLR 120: *Re Mascot Home Furnishers Pty Ltd* [1970] VR 593 at 598 referred to).
>
> (f) If there has been non-compliance by directors with their statutory duties as to the giving of information or furnishing a statement of affairs a full explanation of the reasons and circumstances should be given.

(*Re Telescriptor Syndicate Ltd* [1963] 2 Ch 174 referred to).

(g) The general background and circumstances which led to the winding up order should be explained (*Krextile Holdings Pty Ltd v Widdow* supra referred to).

(h) The nature of the business carried on by the company should be demonstrated and whether or not the conduct of the company was in any way contrary to the 'commercial morality' or the 'public interest'. (2 supra, *Re Dalta Homes Pty* supra referred to).

[14] In addition to the above, the High Court in *Ga-Seng Paper Marketing Sdn Bhd v Percetakan Warni Sdn Bhd* [2015] 9 CLJ 640 had held that there must be evidence to demonstrate that the company will be commercially solvent after the grant of a stay of winding up under s 243(1) of the Companies Act 1965.

THE CONTENTIONS OF PARTIES

[15] The applicant contends that ESH as the contributory making the stay application had failed to fulfill all the requirements as laid down in law, and in particular the principles enunciated in the above case authorities. As such the applicant seeks an order to set aside the stay order.

[16] The contributory, ESH, on the other hand contends that the applicant's application in encl 85 ought to be dismissed as:

(a) the applicant is not legally entitled to file the application to set aside the stay order dated 9 November 2012;

(b) the applicant was late in filing this application (encl 85) and that delay is inordinate;

(c) the application for stay need not be served on the applicant;

(d) there is proof that the creditors of Jeuro have been paid;

(e) there are sustainable grounds for the stay of the winding up order; and

(f) the alleged non-compliance with rules and regulations governing companies in Malaysia subsequent to the stay order is an irrelevant consideration in particular where the applicant is a complete stranger to the proceedings.

ISSUE 1: WHETHER THE APPLICANT IS LEGALLY ENTITLED TO FILE THIS APPLICATION

[17] The contributory, ESH, submits that the applicant is not entitled to file this application and as such all issues canvassed herein are as a consequence not

relevant to the applicant. The basis for that assertion is the applicant's suggestion that ESH as the applicant for the stay of winding up was obliged to serve a copy of the notice of application dated 30 August 2012 (encl 80) on the applicant. This, the applicant contends on the basis that the applicant was in law, a creditor of Jeuro in the winding up proceedings, presumably for maintenance charges said to be due and owing to the applicant for the parcel units owned by Jeuro and was th us entitled to participate in Jeuro's liquidation process.

[18] However, learned counsel for the contributory ESH submits that the applicant is in fact, and as a matter of law, not a creditor of Jeuro as the applicant has never complied with the requisite requirements to make out its purported claim against Jeuro. I find that there is merit in these submissions by learned counsel for ESH. The applicant had under cover of its letter dated 5 December 2011 sent an invoice to the Jabatan Insolvensi Malaysia, Cawangan Melaka, (as liquidator of Jeuro) in respect of alleged outstanding maintenance charges for Jeuro's parcel units in the condo for the period from December 1997–December 2011, Further to that the official receiver's office replied vide letter dated 10 July 2012 refuting the demand for payment for maintenance charges for the period December 1997–December 2011 and stating that the official receiver would pay maintenance charges for any parcel units owned by Jeuro only for the period commencing from the formation of the applicant on 25 May 2012. Thus, the entire claim for arrears in maintenance charges contained in the aforesaid invoices was rejected by the official receiver, as liquidator of Juero. So clearly, the claim for arrears in maintenance charges is a disputed debt, and one which the official receiver had rejected. The applicant did not take issue with the stand taken by the official receiver as regards is claims for arrears in maintenance charges, nor did it file any proof of debt.

[19] Rule 78 of the Companies (Winding-Up) Rules 1972 provides as follows:

> 78 Proof of debt
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> In a winding-up by the Court every creditor shall prove his debt, unless the Judge in any particular winding-up shall give directions that any creditors or class of creditors shall be admitted without proof.

The applicant, however, did not file any proof of debt with the official receiver at any point in time. The contributor ESH had deposed that only Teo Teck Huat (M) Sdn Bhd, Pembinaan Sri Aktif, Aquamech Corp Sdn Bhd, Lagenda Management Corp Sdn Bhd and Malayan Banking Bhd have filed proof of debt with the official receiver. This assertion was hot refuted by the applicant. Thus, I agree with the submissions of learned counsel for ESR that the applicant is not entitled to participate in Juero's liquidation process, specifically

in terms of receiving dividends as creditor, as proof of debt was never filed. Given the above, I find that the applicant is not entitled to file the present application ostensibly on grounds that it is a prospective creditor.

[20] In addition thereto, the stay order has been perfected. As a matter of law, an existing petition, should be regarded as exhausted by a perfected winding up order, which being stayed, would make it necessary for a fresh winding up petition to be presented. See: *Re Intermain Properties Ltd* [1986] BCLC 265. Hence, if the applicant viewed itself as a creditor by virtue of unsettled maintenance charges, it could present a fresh winding up petition, if the debt is undisputed or by obtaining a judgment before hand.

ISSUE NO 2: WHETHER THE APPLICATION FOR STAY (ENCL 80) OUGHT TO HAVE BEEN SERVED ON THE APPLICANT

[21] By virtue of my findings in respect of issue No 1, wherein I had decided that the applicant lacked locus standi to make this application, as it is not within any of the classes of creditors recognised by the official receiver, I find that there is no necessity for the applicant to have been served with the notice of application (encl 80) and its supporting cause papers.

ISSUE NO 3: WHETHER ALL CREDITORS OF JEURO HAD BEEN PAID

[22] The applicant alleges that in the application for stay mere averments were made by ESH that all creditors have been paid or were agreeable, to a proposed settlement, but no supporting documents were produced to prove the same. The applicant further states that ESH did not produce any evidence to show that all creditors of Juero had been paid off. In this regard, the ESH had stated in his affidavit affirmed on 27 August 2012 that the only parties, ie creditors, who filed proof of debt with the official receiver were:

(a) Teo Teck Huat (M) Sdn Bhd;

(b) Pembinaan Sri Aktif;

(c) Aquamech Corp Sdn Bhd;

(d) Lagenda Management Corp Sdn Bhd; and

(e) Malayan Banking Bhd.

And in para 8 of the same affidavit, ESH affirmed and stated that all the amounts stated in the proof of debt which were admitted by the official receiver had been paid out in full prior to the stay of winding up being applied for. This positive averment is not refuted by the applicant and thus stands sis admission of unconfroverted evidence. See: *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609. In any event, by letter dated 17 July

2017 the official receiver has confirmed that a notice of dividend dated 4 November 2012 (Form 94(5)) was issued informing all creditors whose proof of debt had been admitted and that they would be paid 100% dividends. Therefore, I find that nothing turns on this issue.

ISSUE NO 4: WHETHER ESH WAS A CONTRIBUTORY WITH LOCUS STANDI TO MAKE THE APPLICATION FOR THE STAY OF WINDING UP IN ENCL 80

[23] ESH was adjudged a bankrupt sometime in 1999 and was discharged sometime in 2009. Section 8(1) of the Bankruptcy Act 1967 provides that:

> On the making of a receiving order the Director General of Insolvency shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose.

Further, s 216(2) of the Companies Act 1965 reads as follows:

> Contributories in the case of bankruptcy of member
>
> (2) If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after he has been placed on the list of contributories —
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> (a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and
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> (b) there may be proved against his estate the estimated value of his liability to future calls as well as calIs already made.

Learned counsel for the applicant submits that by virtue of operation of these two statutory provisions, the Director General of Insolvency is the 'trustee' of a bankrupt contributory, who represents the contributory for 'all purposes of the winding-up'. Section 216(2) of the Companies Act 1965, authoritatively pronounces that the trustee 'shall be a contributory accordingly' in place of the bankrupt. See *Lai Cheng Ooi (the executrix of the estate of Lee Tain Tshung @ Kee Thien Chiung, deceased) v Naslei Enterprise Sdn Bhd (receivers appointed)* [2015] MLJU 704; [2015] 10 CLJ 409.

[24] Learned counsel for the applicant has further referred the court to the English Court of Appeal case of *Re Wolverhampton Steel & Iron Co Ltd and others* [1977] 3 All ER 467 (CA). In that case a winding up order was made by the court in 1945 in respect of the company. The applicant in that case was a registered holder of fully paid up shares in the company. In 1955 the applicant was adjudicated bankrupt. He was discharged from bankruptcy in 1960 but the adjudicating order was never annulled and the receiving order was not

rescinded. In 1963 the trustee in bankruptcy was released. Sometime in 1976, the applicant, being a contributory, applied under s 256(1) of the Companies Act 1948 (equivalent to our s 243(1) of the Companies Act 1965) for a stay of the winding up order. The court of first instance dismissed that application on grounds that the applicant lacked locus standi. The court held that on becoming bankrupt the applicant had ceased to be a contributory by virtue of s 216(a) of the Companies Act 1948, and although the applicant had subsequently been discharged, the bankruptcy was still subsisting since the adjudication had never been annulled and the receiving order had not been rescinded and, so long as the bankruptcy subsisted, s 216(a) continued to operate. The English Court of Appeal affirmed that decision. The decision of Slade J at the High Court is found at *Re Wolverhampton Steel & Iron Co Ltd and others* [1977] 1 All ER 417.

[25] Hence, on strength of the pronouncement of the English Court of Appeal in *Re Wolverhampton Steel*, learned counsel for the applicant argues that ESH did not have the requisite locus standi to make the application for stay of the winding up for the following reasons:

(a) following the adjudicating and receiving orders in 1999, ESH's shares in Jeuro vested in the Director General of insolvency by virtue of s 8(1) of the Bankruptcy Act 1967 and s 216(2) of the Companies Act 1965;

(b) though ESH's bankruptcy was discharged in 2009, his shares in Jeuro continued to vest in the Director General of Insolvency since there was no annulment of the adjudicating order and rescindment of the receiving order and hence the Director General of insolvency was the 'contributory' in accordance to s 216(2) of the Companies Act 1965; and

(c) in the absence of any order produced by ESH to show that the adjudication has been annulled and the receiving order had been rescinded, the applicant submits that the stay order dated 9 November 2012 should be set aside as ESH was not a contributory of the company when making the application for the stay.

[26] Now, in the summons in chambers (encl 85) the applicant states that the grounds of the application are as set out in the applicant's affidavit In support affirmed by Heng Weng Long and are essentially that the applicant was not served with ESH's notice of application dated 30 August 2012 and as a result of which the views of the applicant as a creditor were not heard. The applicant further states that the grounds relied oil by ESH in applying for a stay of the winding up order are unsustainable and that misrepresentations have been made to the court to secure the stay order. The issue of ESH lacking locus standi by virtue of his status as a discharged bankrupt was never raised as one of

the grounds for the application to set aside the stay order in the summons in chambers nor in the affidavits filed by the applicant. The applicant, at the hearing, put forward for the first time the case of *Re Wolverhampton Steel* and the related arguments on locus standi. This I find is improper, in that the applicant ought to have raised this issue of locus standi as one of the grounds in the summons in chambers (encl 85) or at the very least raised it in the affidavits filed in support of encl 85. The failure of the applicant to do so means that ESH has been deprived of notice and opportunity to meet this challenge head on and is obviously prejudicial to ESH. And thus I am of the view that the applicant must be precluded from raising this issue at submissions stage, without it being in the body of the application or in any of the affidavits in support of the application. Be that as it may, I will nevertheless consider the merits of the applicant's arguments in this regard.

[27] Now, a receiving order is an order of the bankruptcy court placing the debtor's estate under the custody and control of the Director General of insolvency. Whilst upon the making of an adjudicating order, the property of the debtor becomes divisible among his creditors and vests in the Director General of Insolvency. Section 24(4) of the Bankruptcy Act 1967 provides that upon making the adjudicating order, the properly of the bankrupt 'shall become divisible among his creditors and shall vest' in the Director General of Insolvency. 'It is trite law that upon a person being adjudged a bankrupt, all his affairs become vested in the Official Assignee': *Re Low Kok Tuan, ex p Arab-Malaysian Merchant Bank Bhd* [1996] MLJU 442; [1997] 4 CLJ 185, per Low Hop Bing J. 'On the making of the receiving order, the bankrupt's property, land and interest in land vest in the Official Assignee as trustee'. See *Re SM Ali Kader & Co; Re Chop Hock Joo Seng; Re Chop Tye Chiang Heng; Re Chop Kwong Woh Loong* [1937] 1 MLJ 84. Further, in *Chew Kean Kor v Beh Seng Siew* [1958] 1 MLJ 149, Syed Sheh Barakhbah J (as he then was) held that the property of a bankrupt became the property of the creditors arid the official assignee (and now the Director General of Insolvency) was the trustee for the creditors and not trustee for or agent of the bankrupt See: *Halsbury's Laws of Malaysia* Vol 6(2), 2012 Reissue Lexis Nexis, at para 170.128. See also the cases; of *In re Leadbitter* (1878) 10 Ch D 388, *Jarrett v Barclay's Bank, Limited and Nash* [1947] Ch 54.

[28] Now, s 216(2) of the Companies Act 1965 states that when three contributory becomes a bankrupt then 'his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly'. Learned counsel for the applicant argues by relying on s 8(1) of the Bankruptcy Act 1967, that the Director General of Insolvency, who by that section is constituted as the 'receiver' of the property of the debtor, is the trustee referred to in s 216(2) of the Companies Act 1965. But on closer scrutiny, s 8(1) does not 'vest' the property of the bankrupt in the receiver as trustee, but rather

provides the Director General of Insolvency with powers of a receiver only and not as trustee. It is s 24(4) that provides that upon the adjudication order, the property of the bankrupt 'shall become divisible among his creditors and shall vest' in the Director General of Insolvency. The Director General of Insolvency is not described anywhere in the Bankruptcy Act 1967 as a 'trustee' except in s 122(7) in describing his position vis a vis a deceased debtor who dies insolvent. The only other provision which describes a person as a trustee of the bankrupt's assets is in s 18(16) where a deed of arrangement is reached between the bankrupt and his creditors. Therefore, I find that the argument of learned counsel for the applicant that by virtue of s 216(2) of the Companies Act 1965 read with s 8(1) of the Bankruptcy Act 1967, the shares of the Company became vested in the name of the Director General of Insolvency as trustee of the bankrupt is misplaced.

[29] From the *Re Wolverhampton Steel* case, it can be seen that English law describes the person who administers the estate of all bankrupts as a 'trustee in bankruptcy'. The Director General of Insolvency is never described as such in our Bankruptcy Act 1967. This suggests that different considerations applied under English law. When the bankrupt was released in the *Re Wolverhampton Steel* case, the official receiver became the trustee in bankruptcy pursuant to s 92(5) of the English Act, and still held that office pursuant to the provisions of the English Act until an order of annulment and rescission was obtained in respect of the adjudicating and receiving orders: see the High Court decision in *Re Wolverhampton Steel & Iron Co Ltd and others* [1974] 1 All ER 417 at p 421. However, s 82 of our Bankruptcy Act 1967, in relation to the release of the Director General of insolvency after the discharge of a bankrupt, does not have an equipollent provision. In point of fact, Malaysia does not have provision for a private trustee in bankruptcy except in the case of compositions and/or arrangements. Thus, it is my considered view that the English position in *Re Wolverhampton Steel* is not applicable in Malaysia.

[30] In the *Re Wolverhampton Steel* case, as is here, all that the bankrupt obtained was a discharge. What then is the effect of such discharge under Malaysian law? The provisions relating to the effect of discharge found in s 35 of the Bankruptcy Act 1967 are instructive. With effect from 1 January 1999, a bankrupt may, instead of making an application to the court, apply to the Director General of Insolvency for discharge. An order of court or a certificate of discharge issued by the Director General of Insolvency discharging the bankrupt releases the bankrupt from all debts provable in bankruptcy other than those mentioned in s 35(2) of the Bankruptcy Act 1967. In so far as the Director General of Insolvency is concerned, the discharge has no effect on his functions so far as they remain to be carried out. The discharge also does not bring to an end the operation of the provisions of the Act in respect of such functions of the Director General of Insolvency which are yet to be completed.

See ss 35(1)(a) and 35A of the Bankruptcy Act 1967. Therefore, notwithstanding the discharge, a discharged bankrupt shall give such assistance as the Director General of Insolvency requires in the realisation and distribution of such of his property as shall remain vested in the Director General of Insolvency. This, however, is not the situation here, as the Director General of Insolvency has confirmed in letter dated 19 June 2017 that no property of ESH remains vested in the Director General of Insolvency after the discharge. This written confirmation means that the Director General of Insolvency is satisfied that no further functions are necessary to be performed, and has effectively removed itself from control of ESH's property. In the circumstance, after the discharge from bankruptcy, ESH as a discharged bankrupt may commence or continue with legal action as a free person, and this would include making any application in respect of his shareholding in Juero.

[31] In *Pravinchandra Doshi (T/A M/S P Doshi & Co) v Ismail bin Syed Mohamed & Anor* [1999] 1 MLJ 35 at p 42, Jeffrey Tan J (as he then was) in dismissing a similar argument on the competence of a discharged bankrupt to maintain an action held as follows:

> It was also not at all appreciated that the plaintiff was incompetent to maintain the action without the previous sanction of the OA only because he was an undischarged bankrupt. But *when he was granted an absolute discharge, he was entirely freed from the shackles of s 38(1)(a) of the Act. Really, it is so elementary and eotialiv so obvious that it could not be argue otherwise.* Admittedly, as provided by s 33 of the Act, the plaintiff shall, notwithstanding his dischargei give such assistance as the OA requires in the realization and distribution of his property as is vested in the OA, and if he fails to dp so he shall be guilty of a contempt of court;' and the court may also, If it thinks fit, revoke his discharge, but without prejudice to the validity of any sale, disposition or payment duly made, or thing duly done subsequent to the discharge, but before its revocation. *Nonetheless. it remains, that the plaintiff was and Is competent, until the court revokes his discharge, to maintain the action. What more, most pertinently, as the plaintiff was granted an absolute discharge and even given a refund of the surplus funds, which could only have been if the OA had satisfied the claims of the plaintiffs creditors. Whereupon, the OA had no reason to hang on to the estate of the plaintiff or to continue to realize or distribute the property of the plaintiff.* It could only be said, with respect, that Mr Teja's *proposition that the plaintiff despite his absolute discharge has no capacity to maintain the action, because of s 33 of the Act, is totally unacceptable. The proposition is as absurd as it is farcical as to suggest that a man who has served his sentence must yet observe the prison rules.* (Emphasis added.)

[32] I am in complete agreement with the observations of my learned brother Jeffry Tan J (as he then was) as to the effect of a discharge of bankruptcy. Once an absolute discharge is given, the property of the discharged bankrupt, except for those caught under ss 35(1)(a) and 35A of the Bankruptcy Act 1967, divests from the Director General of Insolvency and the discharged bankrupt is free to deal with these property, The Director General of Insolvency has no

reason to hold on to the estate of the discharged bankrupt, especially when all of the bankrupt's debts had been settled. Thus, I do not find any merit in the arguments of learned counsel for the applicant that ESH as a discharged bankrupt lacked locus standi when making the application for the stay of winding up order.

ISSUE 3: WAIVER AND INORDINATE DELAY

[33] Learned counsel for ESH submits that the applicant's application in encl 85 ought to be dismissed in limine as there is inordinate delay in making the application, and that the conduct of the applicant amounts to waiver of any rights that the applicant may have to apply for the setting aside of the stay order.

[34] In this regard, learned counsel for ESH submits that:

(a) on 22 November 2012 and 2 January 2013, the applicant was informed by two separate bodies, namely the Malacca branch of the Malaysian Insolvency Department, and the Majlis Bandaraya Melaka Bersejarah, that the winding up order against Jeuro had been stayed and that Jeuro was operating as normal. However, the applicant did not pursue its supposed rights as creditor against Jeura and instead chose to remain indifferent;

(b) on 16 June 2016, Jeuro, together with Lagenda Management Corp Sdn Bhd ('LMC') filed a suit against the applicant as well as Lai Kuen Vey, Heng Weng Long, Chin Yen Chooi @ Chin Chin Choy arid Chin Keck Meng @ Tart Keck Meng ('the LMC Suit'). On 22 August 2016, the applicant filed its defence in the LMC Suit and did not take any objection to Jeuro's allegedly spurious status as a 'revived' company;

(c) sometime after 28 October 2016, Messrs Michael Chow, the applicant's solicitors, conducted a court file search and discovered the grounds on which ESH made the application for the stay of winding up. Despite that discovery, on 16 November 2016, the applicant filed an application to amend its defence in the LMS Suit and again did not object to Jeuro's allegedly spurious status as a 'revived' company;

(d) after the passage of some 89 days after the alleged discovery of the grounds of ESH's application for the stay, the applicant on 25 January 2017 filed its amended defence and counterclaim in the LMC Suit and still did not object to Jeuro's allegedly spurious status as a 'revived' company;

(e) it was only on 27 January 2017 that the applicant chose to file the present application in encl 85 to impugn the stay order and set it aside; and

(f) the applicant is clearly guilty of unexplained delay of some four years

and two months in filing the application in encl 85, as it was first apprised of the stay order sometime on 22 November 2012.

[35] The chronology of events and the applicant's inaction over a period of more than four years clearly leads to the irresistible conclusion that the applicant had acquiesced and waived its rights to raise any objections to the stay order, if indeed it had any such rights. Further, this inordinate delay is most definitely prejudicial to ESH as a contributory of Jeuro. It is evident that Jeuro, and its shareholders including ESH, and the creditors of Jeuro, and the Director General of Insolvency are prejudiced by the present application to set aside the stay order after such a long time,, as things have been done in anticipation of the stay to be obtained and in reliance of the stay obtained. Amongst the matters undertaken are as follows:

(a) the official receiver has paid dividend at the rate of 100% to all creditors whose claim had been admitted;

(b) filing an application to use Jeuro's company name;

(c) filing an application to uplift a fixed deposit and ensuring that creditors whose proof of debt had been accepted were duly paid;

(d) enabling the Director General of Insolvency to remit the sum of RM919,468.44 to Malayan Banking Bhd, a creditor of Jeuro;

(e) filing an application for stay of the winding up order;

(f) securing a judgment in the Court of Appeal in an appeal brought, inter alia, by the applicant against a dismissal of an appeal by the High Court, Malacca; and

(g) instituting the LMC Suit against inter alia the applicant and filing the defence to the applicant's counterclaim in that suit.

[36] I further find that the application in encl 85 is not a bona fide application and is made for a collateral purpose. Pursuant to the findings or decisions of three separate tribunals, that is, the Malacca Sessions Court, the Malacca High Court and the Court of Appeal, the applicant has wrongfully and unlawfully received monies that belongs to Jeuro. This is evident from the judgment of the:

(a) Malacca Sessions Court in Suit No 52–1162–11 of 2012, where the court found as follows:

> [34] Akhir sekali kita berbalik semula kepada soalan yang perlu dijawab bagi isu fni teniang milik siapakah wang kutipan yang telah dikutip oleh Defendan dari pemilik-pemilik kondominium. Untuk menjawab soalan ini kita hanya perlu merujuk kepada kes *Badan Pengurusan Bersama Paradesa*

Rustika v Sri Damansara Sdn Bhd [2014] 1 MLJ 14 yang telah dlputuskan oleh Mahkamah Persekutuan.

...

[36] Kesimpulannya, wang tersebut adalah wang tersebuf adalah milik Jeuro yang dikutip melalui ejen pengurusannya iaitu Defendan. Defendan telah memegang wang tersebut sebagai amanah bagi pihak Jeuro.

...

[52] Tuntutan Defendan terhadap Pihak Ketiga Pertama, Pihak Ketiga Kedua dan Pihak Ketiga Ketiga dibenarkan kerana Defendan telah Beijaya membuktikan bahawa pemindahan wang milik Defendan yang dilakukan oleh Pihak Ketfga Kedua dan Pihak Ketiga Ketiga adalah tidak sah.

(b) Malacca High Court Civil Appeal No 12B-NCVC-16–10 of 2014, where the court found as follows:

9. Saya tidak akan menyentuh semua isu yang dibangkitkan. Memadai dengan satu isu yang paling kritikal iaitu milik siapakah wang yang dipegang di dalam akaun responden, yang kemudiannya telah dipindahkan ke dalam akaun perayu pertama ie Badan Pengurusan Bersama Kondominium Lagenda, JMB.

Diimbas kembali, perayu menghujahkan bahawa isu siapakah pemilik wang tersebut adialah tidak penting dalam fakta tindakan ini ... Setelah dibuat penelitian dan tanpa apa-apa keraguan, wang tersebut dipegang untuk dan bagi manfaat pemaju, ie Jeuro Development Sdn Bhd.

10. Secara keseluriihan, saya bersetuju dengan penghujahan peguam responden (berkaitan dengan isu-isu Iain yang dibangkitkan), dan mendapati tindakan memindahkan keseluruhan wang berkenaan ke dalam akaun JMB adalah salah dan tidak sah.

(c) the Court of Appeal, in Civil Appeal NoM-04(NCVC)(W)-1–01 of 2016, had on 19 August 2016 affirmed the decision of the Malacca High Court.

[37] Thus, the applicant finds itself owing a large sum of money to Jeuro pursuant to the judgment of the Court of Appeal. In this regard, I find that the present application has been filed for the collateral purpose of attacking that final judgment, and is not made bona fide as a creditor of Jeuro who is interested in realising its debts allegedly owed by Jeuro. If indeed the applicant was genuinely interested in claiming the maintenance charges owed by Jeuro, then it ought to have taken action a long time ago when the Director General of Insolvency rejected its claim for the alleged arrears in maintenance charges. Even now, if such charges were lawfully outstanding the applicant can still pursue its claim in the courts or the Strata Tribunal, as the case may be. There is no necessity for the applicant to seek to impugn the stay order after a lapse of more than four years.

[38] Wherefore, I dismissed encl 85 with cost of RM5,000.

Applicant's application dismissed with cost of RM5,000.

Reported by Mohd Kamarul Anwar